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No. 04-23

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILLIAM DWIGHT LANDRENEAU,
Secretary for the Louisiana Department
of Wildlife and Fisheries,

Petitioner,

v.

PELTS & SKINS, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether using mandatory assessments imposed on alligator farmers under Louisiana Revised Statutes 56:253 and 279 to fund generic marketing programs (as opposed to funding other, legitimate purposes authorized for those fees) violates the First Amendment rights of alligator farmers that disagree with the message of generic marketing.

STATEMENT OF THE CASE

The Secretary of the Louisiana Department of Wildlife and Fisheries ("DWF" or "Petitioner") describes this case as "a First Amendment challenge to the mandatory assessment" that creates a fund from which DWF supports generic marketing. Petition at 2. That statement is plainly wrong. Pelts & Skins, L.L.C. ("Pelts & Skins") has never challenged any mandatory assessment in these proceedings. The assessment ancillary to the First Amendment challenge before the Court continues to be collected and used by DWF to fund other programs authorized by statute.

Indeed, Pelts & Skins could not have invoked the jurisdiction of the federal courts to challenge the assessment itself, given the Eleventh Amendment's bar to jurisdiction in such cases. *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908), only authorizes Pelts & Skins to obtain prospective injunctive relief based on the unconstitutionality of the generic marketing expenditures funded by the mandatory assessment. Accordingly, the affirmed Judgment of the district court in this matter is narrowly tailored, permanently enjoining Petitioner from "approving, authorizing or expending any revenue . . . from the Louisiana Alligator Resource Fund for the purpose of generic alligator marketing." [R. at 241.]

This case is squarely based on *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S. Ct. 2334 (2001), where the Court held mandatory assessments to fund generic advertising of mushrooms violate the First Amendment rights of mushroom growers that object to the generic marketing message. One difference between Louisiana's statutory alligator scheme and the federal mushroom marketing statute

at issue in *United Foods* is that Louisiana's mandatory assessment creates a revenue fund that has other regulatory goals in addition to generic marketing, whereas the federal statute at issue in *United Foods* had only one objective — to generically market mushrooms. But that difference is constitutionally insignificant, as Pelts & Skins has not challenged either (1) the assessment itself, or (2) the funding of other, statutorily authorized programs of regulation.

PETITIONER'S MISSTATEMENTS OF FACT AND LAW

DWF's Generic Marketing Program. DWF has conceded that its alligator marketing program is generic (i.e., it promotes alligator products generally, without differentiating any particular type, quality, or brand of alligator products). DWF actually has no control over the content of its own generic marketing strategy. Rather, the Louisiana Fur and Alligator Advisory Council (the "Alligator Advisory Council"), whose members represent "a cross section of [Louisiana's] trappers, alligator hunters, coastal landowners and alligator farmers" [La. R.S. 56:266(C)], is the exclusive source of recommendations for the marketing programs funded by the Louisiana Alligator Resource Fund. La. R.S. 56:266(E)(3). Petitioner can only approve or reject these marketing expenditures. Thus, DWF does not maintain "editorial control" of the generic marketing message.

Petitioner asserts that Pelts & Skins is a part of a group that "benefit[s] the most" from generic marketing. Petition at 15. That position is less than accurate.

First, the record below established that DWF's generic marketing program allows certain alligator farmers, acting through the Alligator Advisory Council, to perform their own direct marketing — at the expense of Pelts & Skins. The Alligator Advisory Council recommended, and DWF approved, the hiring of a consultant to attend fashion trade shows at various corners of the globe. That same consultant also sells alligator skins for a collective of independent alligator suppliers. When attending trade shows throughout the world, at the expense of Pelts & Skins and of other Louisiana farmers subject to the mandatory assessment, he markets alligator skins on behalf of competitors of Pelts & Skins. Such a "generic marketing program" advances only the interests of certain private entities, and does nothing to advance the interests of either the government or Pelts & Skins. Thus, the Fifth Circuit specially noted the contention of Pelts & Skins that the generic marketing program may be nothing more than a "boondoggle." *Pelts & Skins, LLC v. Landreneau*, 365 F.3d 423, 426 (5th Cir. 2004).

Second, the implementation of DWF's generic marketing program does not follow any reasoned strategy. Pelts & Skins therefore is opposed to the generic marketing message because: (1) there is no proof that DWF's marketing actually increases aggregate demand, (2) generic marketing dilutes the distinctiveness of the marketing image of Pelts & Skins, which promotes the unique qualities of its own brand of alligator skins based on its competitive advantage in the science of animal husbandry, and (3) generic marketing tends to denigrate product image, and may even act to lower prices.

Alligator Regulation Does Not Restrict Market Autonomy. In *United Foods*, the Court distinguished *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457,

117 S. Ct. 2130 (1997), by holding that a government entity cannot force a private business to fund commercial speech unless the affected industry acts collectively under a broad regulatory scheme that restricts marketing autonomy. *United Foods*, 533 U.S. at 413, 121 S. Ct. at 2339. In the instant case, the record below overwhelmingly demonstrated that the alligator industry does not act collectively under a broad regulatory scheme that restricts marketing autonomy. The Fifth Circuit correctly concluded:

> Without an underlying collectivized association, a state cannot justify a compelled subsidy. *See United Foods*, 533 U.S. at 413-15. Louisiana alligator producers are not part of a collective association akin to *Glickman's* marketing cooperative. None of the laws governing alligator production imposes collective rather than competitive marketing as the scheme in *Glickman* did. *Cf. Cochran*, 359 F.3d at 275. Rather, as the Secretary admits, the State of Louisiana does not regulate prices in the alligator market, and alligator harvesters are free to negotiate prices and to market products as they wish.

Pelts & Skins, LLC, 365 F.3d at 433.

DWF argues that the alligator industry is subject to "comprehensive regulation." Petition at 6. Admittedly, the State of Louisiana regulates many aspects of alligator hunting and farming. But the scope of that regulation clearly does not include restrictions on marketing autonomy, the Court's sole relevant inquiry with respect to compelled commercial speech.

DWF's Generic Marketing Is Not Government Speech. DWF's government speech analysis is similarly flawed. The injunctive relief ordered by the district court leaves DWF free to engage in any generic marketing program it might select, provided that program is funded by general revenues, and not by a tax or assessment imposed on only one group. Furthermore, the Alligator Advisory Council controls the content of the marketing, and it reflects the interests of certain private alligator farmers. Thus, DWF's generic marketing is properly characterized as "a program in which the government uses its authority to exact fees from private individuals, then facilitates the use of those fees to express a message designed to benefit private commercial interests. This sort of program is not government speech." *Id.* at 432.

Respectfully submitted,

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